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THE COMMERCE CLAUSE AND THE STATE.

It has been a matter of observation, and of some concern, among thoughtful men in this country who have attended to the evolution of constitutional doctrine as declared by the Supreme Court of the United States, that that body has perhaps, in a few respects, unwisely expanded Federal power. For example, the view is held not only by strict constructionists, but by many who are in sympathy with the doctrine of a broad nationality, that the Court has erred in establishing as its law that the Federal Courts are not bound by the decisions of the courts of the State where they happen to be sitting, on matters of general commercial law, and other subjects not involving a construction of the Federal Constitution, statutes and treaties. The harmony of our two systems of government, State and National, would seem to require, not only that the State Courts should be permitted to construe their own Constitutions and statutes, but that the principles of general law established by them, should be obligatory upon the Federal Courts administering law in the several States and taking jurisdiction solely on the ground of citizenship. The establishment of a Federal commercial law is conceived to be an excrescence on the Federal system. The extension of Congressional power, by late decisions of the Supreme Court, has also been the subject of some animadversion. When the second series of Legal Tender Cases were decided (1870), 12 Wall. (79 U. S.) 457, it was charged that the Court was packed by President Grant, for the

special purpose of securing the desired judgment. The decision in this series of cases is now deemed sound by many who withhold their assent to the doctrine of the latest Legal Tender Case: *Juilliard* v. *Greenman* (1883), 110 U. S. 421, which declared that Congress may, in time of peace, and not strictly as a war measure, make treasury notes a legal tender.

Because of these, and perhaps a few other doubtful extensions of the power of the Federal Courts and the National Congress, some thinkers of an atrabilious tendency have worked themselves into the uncomfortable frame of mind of supposing that our great Court of last resort is chiefly occupied in a conspiracy against local self-government, as a principle of American law, and against the States, as organs of the expression of that principle.

In order to guard against such careless judgments, it is useful for the profession, holding, as it does, the Supreme Court in high esteem, not only as our chief protector of National interests, but also as the great conservator of State rights within the Constitution, occasionally to reflect upon the facts of the limitations upon Federal power that have been established by that body. It is proposed in this article to show, by a few illustrations of the evolution of the law of one of the great National powers—the commerce power—that the Court has maintained, and has indeed advanced upon itself in maintaining, the limitations of the Constitution as they relate to State functions of government.

The development of the Constitution, during a century of interpretation by the Supreme Court, is believed to have been mainly a natural and healthy growth, fully within the lines marked by those who framed it. If its words have expanded with the years, so as to give room for the growing Nation, it is conceived, generally speaking, that it is not because the Supreme Court has been false to its trust in interpreting them, but rather that it has been true and loyal to the purpose of its creation, in permitting them to have the full significance they were intended to possess. When the capacity of the words the statesmen of 1787 fixed in the Federal Constitution, comes to its final measure in the coming time, many believe that it will be among their best titles to renown that they framed an

instrument as potential of good in the hands of just interpreters in the future, as it was sufficient for the more immediate objects of its creators when it was first called into being.

The commerce clause of the first article of the Constitution, giving to Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, has, perhaps, more than any one grant of power in our fundamental law, helped to make us the Nation we to-day are. But they read the history of the formation of the Constitution wrong, if they read it at all, who assert that it was not the deliberate purpose of those who inserted it in the Constitution, to make it contribute in the way it has to the National growth. Hamilton and Madison and Wilson intended to make a Nation, as well as to construct an instrument of government. It is well known that the want of the power in the old Confederation to regulate commerce, assisted materially in bringing about the formation and adoption of the Constitution. The commerce clause was adopted by the Philadelphia Convention with unanimity and almost without debate, saving the portion of it relating to the Indian tribes. Immediately upon its adoption by the people, the petty restrictions on interstate trade that some States had established under the Confederation, gave way to unfettered freedom of intercourse. The unavailing, because ununited, efforts of the several Legislatures to develop American commerce, were abandoned for efficient Congressional action that gave the sea to our ships and gave ships to the sea. American vessels found the same anchorage in European ports that foreign ships were accorded here. He would have been a dull observer and a feeble patriot who failed to see and to welcome the new commercial order. All this was early fruit. The growing years have since brought into view the larger purpose of those who, while seeking an immediate good, were mindful of future needs—while building a structure for the day, were erecting for all time.

It has been remarked by jurists that the constitutional law of the commerce clause to-day, is practically the constitutional law of the first commerce case that came before the Supreme Court. Said Justice LAMAR, in *Kidd* v. *Pearson* (1888), 128 U. S. 1, 16—

"The line which separates the province of Federal authority over the regulation of commerce, from the powers reserved to the States, has engaged the attention of this Court in a great number and variety of cases. The decisions in these cases, though they do not in a single instance assume to trace that line throughout its entire extent, or to state any rule further than to locate the line in each particular case as it arises, have almost uniformly adhered to the fundamental principles which Chief Justice MARSHALL, in the case of *Gibbons* v. *Ogden* (1824), 9 Wheat. (22 U. S.) 1, laid down as to the nature and extent of the grant of power to Congress on this subject, and also of the limitations, express and implied, which it imposes upon State legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits, of purely internal concern."

The truth is, however, that practically there has been both an expansion and a limitation in respect of Federal commercial power—an expansion or enlargement of the subjects of the exercise of the power, a limitation or clear marking of the lines within which it is exercisable. There has been no expansion of doctrine as to the scope of the grant of power; but a very necessary enlargement of occasion for its exercise.

When it was decided in 1877 in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, that the Western Union Telegraph Company, having accepted the Act of Congress of 1866, could not be excluded by the Legislature of that State from doing business in Florida, it perhaps seemed to some a great advance on the doctrine of *Gibbons* v. *Ogden*, that the State of New York could not, by the grant of an exclusive franchise to one person, to navigate with boats moved by fire or steam all the waters within the jurisdiction of the State, deprive another person possessed of the right to carry on the coasting trade, from running steamboats between Elizabethtown in New Jersey and New York. It was merely, however, declaring that the telegraph, as well as the steamboat, was an instrument of interstate commerce. The power in Congress to construct interstate and transcontinental railway lines, considered in *California* v. *Central Pacific Railroad Co.* (1887), 127 U. S. 1, as well settled, and the power to pass such comprehensive legislation as the Interstate Commerce Act of 1887, regulating the management of the interstate railways of the United States, were vast additions of power to that enjoyed by the first Congress, only because the railway had joined the steamboat as an instrument of commerce, and

because the small territory of the infant republic of thirteen struggling States had grown to the imperial domain of a Nation of thirty-eight.

A large share of the evolution, if not alteration, of judicial opinion, as to the scope of the commerce clause, that is to be seen in its development thus far, is due to the ripening of thought on the subject of its limitations.

No better illustration of this is to be found than in, what might be called, the histology, and the subsequent history of the modern doctrine as to the exclusiveness of the power in Congress, to regulate interstate and foreign commerce.

"In the complex system of polity which prevails in this country," said Mr. Justice SWAYNE, speaking for the Court in *Ex parte McNeil* (1871), 13 Wall. (80 U. S.) 236, 240, "the powers of government may be divided into four classes: Those which belong exclusively to the States; those which belong exclusively to the National Government; those which may be exercised concurrently and independently by both; those which may be exercised by the States, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance, until the occasion for its exercise shall recur."

At least three views have been promulgated as to the extent of the commerce power. They may for convenience be termed the earlier view, the later and maturer view, and the views of Mr. Justice DANIEL.

The reasoning of the great Chief Justice, in *Gibbons* v. *Ogden*, clearly points towards the broad and simple rule early laid down and adopted by some of the judges, if not by the majority of the Court, that the very grant of power to Congress to regulate commerce, *ipso facto* excludes all control over it by the States. Said the Court in its opinion in that case, p. 209—

"It has been contended by the counsel for the appellant that as the word 'to regulate' implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the Court is not satisfied that it has been refuted."

The case was in fact decided on the ground that Congress had regulated the particular subject matter under considera-

tion, and that therefore State regulation of it was impossible. But the argument sanctioned by the Court would lead to the conclusion that, whether Congress had acted or not, the States could not exercise power. Indeed Justice JOHNSON, in a separate opinion, distinctly affirmed and applied this doctrine to the case.

This position was maintained by Justice STORY in his dissenting opinion in *New York* v. *Miln* (1837), 11 Pet. (36 U. S.) 102, in which he stated that he had the concurrence of Chief Justice MARSHALL. Justice BALDWIN in his dissenting opinion in *Groves* v. *Slaughter* (1841), 15 Pet. (40 U. S.) 449, 511, Justice MCLEAN in the *License Cases* (1847), 5 How. (46 U. S.) 504, the same Justice and Justices WAYNE and MCKINLEY in *The Passenger Cases* (1849), 7 How. (48 U. S.) 283, and Justices MCLEAN and WAYNE in *Cooley* v. *Board of Wardens* (1851), 12 How. (53 U. S.) 299, held this view.

The Court was without cohesion on constitutional questions, after the death of Chief Justice MARSHALL in 1835. His vigorous personality seems almost uniformly to have moulded its opinions during his lifetime. During, what might be called, the era of individual views, which began with the case of *New York* v. *Miln*, in 1837, and continued for a score of years, the doctrine of the exclusiveness of power in Congress was the subject of very earnest and even acrid discussion among the members of the Court. Every case was a battle ground. The views of the individual judges were so diverse, that in some cases each judge wrote his own opinion, and no opinion of the Court was possible. In the *License Cases*, six judges wrote nine opinions. In the *Passenger Cases*, there were eight opinions.

In *New York* v. *Miln*, Justice THOMPSON declared that the power was not exclusive in Congress, but that State regulation was possible, unless Congress had acted on the particular subject in such a way as to antagonize the State law. In the *License Cases* Chief Justice TANEY and Justices CATRON, NELSON and WOODBURY, and in the *Passenger Cases* the Chief Justice and Justices NELSON and WOODBURY supported this view, Justice DANIEL in the latter case asserting it, and going much farther, as will be seen.

Justice DANIEL was infused with the doctrine of State sovereignty in its old sense. He magnified the State, he minified the Nation. In the *Passenger Cases*, he whittled down the word *commerce* to the smallest possible dimensions, making it equivalent to trade and navigation, and denying that it extended to intercourse, as established in *Gibbons* v. *Ogden*. In his conception, the grant of inter-State and foreign commerce power to Congress, was not only not exclusive, but was neither large nor comprehensive. A large residuum of such power was left in the States, to be exercised not merely if Congress had not interfered or should not interfere, but to be enjoyed to the exclusion of Congressional action in certain ways. In the *Passenger Cases*, he contended that the right of the State to admit foreigners upon its own terms, or to exclude them altogether, was purely a subject of State law. In *Cooley* v. *Board of Wardens*, he affirmed that the power to enact pilot laws, which were agreed to be regulations of commerce, was not within the terms of the grant to Congress, was an original and inherent power in the States, and was not one to be merely tolerated by or held subject to the sanction of the Federal Government. The opinions of Justice DANIEL are all vigorous and even profound, but the chief characteristic of his views, as related to the development of the law of the commerce clause, is their eccentricity. They contributed in no respect to the advancement of opinion, and do not seem to have been shared by other members of the Court. Their interest to-day is purely historical. The earnest and repeated objections expressed by some of the members of the Court, to the rigid doctrine of absolute exclusiveness of power in Congress, over commerce with foreign nations and among the States, brought about a re-statement of the law. The advocates of the non-exclusive theory practically had a majority as early as 1847, when the *License Cases* were decided. Four of the Justices, as already mentioned there, formally adopted it, and although Mr. Justice DANIEL then expressed no opinion on the subject, he believed wholly with the Chief Justice and Justices CATRON, NELSON and WOODBURY.

The non-exclusive theory, as stated at that time, is well ex-

pressed by Chief Justice TANEY in the *License Cases* (1847), 5 How. (46 U. S.) 504, 578. He said—

"It is well known that, upon this subject, a difference of opinion has existed, and still exists, among the members of this Court. But, with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the General Government can not, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and among the several States, is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."

The modern doctrine was first distinctly formulated and adopted by the Court in 1851, in *Cooley* v. *Board of Port Wardens*, 12 How. (53 U. S.) 299, 319. Said Mr. Justice CURTIS, speaking for himself and Chief Justice TANEY, and Justices CATRON, MCKINLEY, NELSON and GRIER, who composed the majority of the Court—

"The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [pilotage], as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. *Whatever subjects of this power are in their nature National, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.*"

The counterpart of the rule was not definitely formulated till 1865, when Justice SWAYNE, speaking for the Court in *Gilman* v. *Philadelphia*, 3 Wall. (70 U. S.) 713, 726, said that to the extent that the subjects require rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively, the power to regulate commerce may be exercised by the States.

There was no absolute unanimity in the Court on this subject until much later. In *Cooley* v. *Board of Wardens*, Justices MCLEAN and WAYNE expressly dissented, adhering to the old doctrine, and in *Gilman* v. *Philadelphia*, Justices CLIFFORD,

WAYNE and DAVIS dissented from the opinion on other grounds, but so as to weaken the force of the views as expressed by the majority. As late as 1872, it was asserted by the Court that it had "never yet been decided by this Court that the power to regulate interstate, as well as foreign, commerce, is not exclusively in Congress:" *Case of the State Freight Tax*, 15 Wall. (82 U. S.) 232, 279. It was not till 1875 that the whole Court united in the adoption of the modern rule. The case was *Welton* v. *State of Missouri*, 91 U. S. 275. The Court was then composed of Chief Justice WAITE, and Justices CLIFFORD, HUNT, STRONG, BRADLEY, SWAYNE, DAVIS, MILLER and FIELD. Mr. Justice FIELD defined the scope and limitations of the grant in the commerce clause, in terms which have been only slightly modified since. He said, at pp. 279, 280—

"The power to regulate conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be hindered by duties and imports, and how far it shall be prohibited. Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of one country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it, embraces all the instruments by which such commerce may be conducted. So far as some of those instruments are concerned, and some subjects which are local in their operation, it has been held that the State may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is National in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority."

The only extension which is needed to this language, to make it absolutely full and comprehensive, is in the enlargement of the subjects included in the meaning of the word *commerce* as above defined, so as to embrace persons as well as commodities, traffic as well as intercourse, and covering navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities, and also the instruments auxiliary to these and directly connected therewith. Such late cases as *County of Mobile* v. *Kimball* (1880), 102 U. S. 691; *Webber* v. *Virginia* (1880), 103 Id. 344; *Transportation Company* v. *Parkersburg* (1882), 107 Id. 691; *Escanaba Co.* v. *Chicago* (1882), 107 Id. 678; and

Brown v. *Houston* (1884), 114 Id. 623; recognize this extension of meaning.

The modern doctrine, limiting the exclusiveness of the grant in the Constitution, to subjects of a national character, is the crystallization into a rule, of the wide national powers recognized in *Gibbons* v. *Ogden*, and the necessary State powers over matters affecting commerce, affirmed in *Wilson* v. *The Black Bird Creek Marsh Co.* (1829), 2 Pet. (27 U. S.) 245. The harmonious working of the governments, State and National, it is now seen, required the more plastic rule at present current. The fact that this doctrine is the outcome by logical deduction from early cases as now understood, does not the less give it the effect of a progressive limitation, so far as the Supreme Court is concerned. For the doctrine will always be placed for comparison, by the side of the view once held and enforced by STORY and MARSHALL, that the exclusiveness of the power in Congress was subject to no qualification whatever.

With what faithfulness, in working out the modern rule, the Supreme Court has remained true to the Constitution as it was intended to be, is shown by a passage in the Federalist. In the thirty-second paper of that collection, Hamilton said—

"This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; *and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.*"

Another illustration of the clarification of thought, if not actual modification of opinion, as to the limitation of Federal power in favor of the States, is seen in the recognition of State power over the highways of interstate commerce, wholly within the borders of a State. When it was laid down in *Gibbons* v. *Ogden*, that the power in Congress to regulate interstate and foreign commerce did not stop at the jurisdictional or external boundaries of the States, but penetrated throughout their extent, a very necessary principle was established, without which the grant to Congress would have been of trifling value. But it would have been very easy to advance from this position, which carried with it the potential control by the United States of

the avenues of interstate commerce within the States, to the denial of actual control by the States of such avenues in the absence of Congressional action. For a time, it seemed as if the Court, by a liberality of interpretation of Federal statutes, was about to deny to the States this control. In the great *Wheeling Bridge* case (1851), 13 How. (54 U. S.) 518, the Court declared the erection of a bridge across the Ohio River, wholly within the State of Virginia and erected under authority of that State, a nuisance, and required its abatement. This was done, it is true, not because the State, in the absence of Congressional action, was in theory considered as without power to authorize the structure as built, but because Congress had in fact legislated in such a way as to the free navigation of the Ohio River, that the State legislation affecting such navigation was invalid. The specific Congressional action upon which the majority of the Court relied in their opinion, was, that ports of entry had been established above the bridge, vessels had been licensed to sail upon the river, duties had been imposed upon the officers of vessels, and a compact for the free navigation of the river entered into between Virginia and Kentucky, had been sanctioned at the time of the admission of the former State into the Union.

It is only necessary to point out that if such general Congressional action had been maintained by the Court, through later years, as sufficient of a regulation of the specific subject to oust State action in the premises, comparatively little power would remain in the States to-day over even their purely internal commerce, connected as the avenues of such commerce are, with those leading to other States. In the natural and legitimate growth of the States during the last twenty-five years, bridges have been built below Federal ports of entry, totally cutting off access by sailing vessels to points above them; vessels of the United States enjoying coasting and river licenses have been prevented from sailing to such points, and the free navigation of streams having outlets to other States and to foreign ports, has not been maintained, as such "free navigation" was defined in the *Wheeling Bridge* case. Much of this has been done without Federal authority, and to the great advantage of the people of the States and the strength-

ening of their several governments. It has been so done because the Supreme Court, in the evolution of its thought, has established better and broader doctrines as to State control over the avenues of commerce, than those laid down by Justice McLEAN in the *Wheeling Bridge* case.

In the Chestnut Street Bridge case, *Gilman* v. *Philadelphia* (1865), 3 Wall. (70 U. S.) 715, the Court, practically receding from the postulates of the *Wheeling Bridge* case to that extent, declared that general Congressional action establishing a port of entry above the site of a proposed bridge on the Schuylkill River, and the licensing of vessels to carry on the coasting trade to and from the port, was not sufficient legislation on the subject to negative the right of the State to authorize the erection of the bridge, although the bridge when built would prevent all access of the licensed vessels to points above it. The majority of the Court properly considered the State as entitled to control its own avenues of commerce, and with a prescient, practical sense, refused to limit the State in establishing new avenues of land as well as water communication within its borders, so long as Congress had not limited it either by specific laws or by a definite policy of action. Had the State of Pennsylvania been declared incompetent to bridge the Schuylkill at West Philadelphia, because a few vessels of National register had previously been accustomed to drop their anchors higher up the stream, a large part of the legitimate State powers of internal improvement would, from that time, have been given over to Congress, to the very great detriment, as we must believe, of the public interest. The development of land communication by rail and road, necessitating the crossing of streams and affecting interstate and foreign commerce, would have been sacrificed to the masters of sailing vessels, or else all power, and not, as our system properly provides, merely controlling power over the subject, lodged in Congress.

Since this case, the Court has further receded from the doctrine once conceived to be established by the *Wheeling Bridge* case, that a general declaration of Congress as to the free navigation of a public stream within the Federal jurisdiction, prevented a State from bridging it or otherwise obstructing navi-

gation. In a series of cases, commencing with *Escanaba Co.* v. *Chicago* (1882), 107 U. S. 678, or perhaps with *Pound* v. *Turck* (1887), 95 Id. 459, and ending with *Willamette Iron Bridge Co.* v. *Hatch* (1887), 125 Id. 1, the Court has defined such phrases, as that a river shall be "a common highway and forever free," as referring not to physical obstructions, but to political regulations tending to hamper the freedom of commerce. Such phrases were considered by the Court in *Cardwell* v. *American Bridge Company* (1884), 113 U. S. 205, 212—

"As having but one object, namely, to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation," and "contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public."

In *Willamette Iron Bridge Co.* v. *Hatch*, the Court formally and finally abandoned all positions of the *Wheeling Bridge* case, tending to limit the control of the States over their highways by general declarations of Congress. It placed the decision in that case, upon grounds peculiar to it. The proper ground for the decision, was stated to be, that, the Court having original jurisdiction in consequence of a State being a party, and the plaintiff, by reason of its status, having the right to invoke and the Court to apply any law applicable to the case, State law, Federal law, or international law, the State of Pennsylvania was entitled by State and international law, and not by general Federal legislation, to have the Ohio River unobstructed by the bridge in question, until Congress should definitely act by legalizing the structure, as it in fact did. See 18 How. (59 U. S.) 421.

Another important service the Supreme Court has rendered to the States, is in the care with which, while giving due force to the commerce power of Congress, it has maintained the absolute supremacy of the States over their purely internal affairs, free from Federal interference. The decisions in *Wabash, St. Louis and Pacific Railway Company* v. *Illinois* (1886), 118 U. S. 557, and *Bowman* v. *Chicago and Northwestern Railway Company* (1887), 125 Id. 465, and in the many tax cases that have come before the Court in recent years, wherein broad

National doctrines have of necessity been expounded, must not blind us to the fact that the Court, by its record, is as true a conservator of the rights of the States, in itself abstaining, and in requiring Congress to abstain, from interference with matters purely of State cognizance, as in laying down wide limits of State action in the absence of Congressional action. It has established the exclusive control by the States over their non-navigable streams, and their navigable streams above the points where they are available for interstate traffic: *Veazie* v. *Moor* (1852), 14 How. (55 U. S.) 568. It has declined to interfere with State policies, as to interstate industries not strictly commercial in character, as in the cases establishing that the States may determine upon what terms foreign insurance companies, mining companies and the like may do business within their borders: *Paul* v. *Virginia* (1868), 8 Wall. (75 U. S.) 168; *Ducat* v. *Chicago* (1870), 10 Id. (77 U. S.) 410; *Liverpool Insurance Company* v. *Massachusetts* (1870), Id. 566; *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 110; *Pembina Consolidated Mining Company* v. *Pennsylvania* (1887), 125 Id. 181.

The absolute State jurisdiction over ferries, even at the boundaries of States, has been affirmed and reaffirmed: *Fanning* v. *Gregoire* (1853), 16 How. (57 U. S.) 524, 534; *Conway* v. *Taylor* (1861), 1 Black (66 U. S.) 603. The distinction between charges for wharfage, and taxation upon commerce as such, is an important gain towards a clear marking of the lines of State action: *Packet Company* v. *Keokuk* (1877), 95 U. S. 80; *Packet Company* v. *St. Louis* (1879), 100 Id. 423; *Packet Company* v. *Catlettsburg* (1881), 105 Id. 559.

State laws taxing the property of non-residents, where there is no discrimination because of non-residence and no element of a tax on interstate traffic as such is involved, have always been sustained. Several interesting recent cases deserve to be noticed. In *Brown* v. *Houston*, *supra*, p. 742, it was held that coal, owned by citizens of Pennsylvania, but lying at the port of New Orleans, and sent there for sale, was taxable as property at that port, although, after arrival, it was sold in the boat without being landed, and for the purpose of being taken out of the country on a vessel bound for a foreign port. So, in *Coe* v. *Errol* (1885), 116 U.S. 517, logs lying at a shipping port in New

Hampshire, designed for transportation to another State, but not yet in transit, were held subject to taxation there.

The application by the Court in the *Trade-Mark Cases* (1879), 100 U. S. 82, of the doctrine of the exclusion of Federal authority from regulating commerce purely internal in kind, was perhaps a surprise to some, but it was only in the line of the earlier conservative decision in *United States* v. *De Witt* (1869), 9 Wall. (76 U. S.) 41, where it was held that an Act of Congress regulating the vendible quality of illuminating oils was not enforceable within State limits.

Much of the criticism that has been made upon the attitude of the Court, charging it with a failure to apprehend the true importance of the State governments as such, it will now be seen, is somewhat unreflecting, at least so far as the law of the commerce clause is concerned. That clause has been selected by way of illustration, because, of all the powers in the National grant, it is the one where we might least expect recognition of State authority. There are, of course, a few still among us who, with backward glance, like Justice DANIEL in his time, fail to see in its full outline the Nation that was potentially created when the Constitution was made, and which it has been the high destiny of the Supreme Court of the United States to disclose to the world. To these and such as these, whose primary instinct is jealousy of National power, all power but that of the States, is suggestive of usurpation, and the true significance of the development of the Constitutional law of the United States, whether in the line of expansion or of limitation, is not to be shown. Happily, however, for the progress of ideas, "that bald sexton Time" is fast gathering them to their fathers.

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